BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN THE MATTER OF:	)	
	)	
Glen Welsh, Owner	)	
New Creek Investments	)	Docket No. SDWA-3-99-0005
	)	
PWS I.D. No. WV3302941	)	
	)	

DEFAULT ORDER

This administrative proceeding for the assessment of a civil penalty was initiated by the Director of the Water Protection Division for Region III of the United States Environmental Protection Agency ("Complainant") pursuant to Section 1414 of the Safe Drinking Water Act, 42 U.S.C. § 300g-3 ("SDWA") and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 [published at 64 *Fed. Reg.* 40138 (July 23, 1999)]. In his Complaint, issued September 30, 1999, Complainant alleged that Glen Welsh ("Respondent"), owner of New Creek Investments, had violated the SDWA, 42 U.S.C. §§ 300f *et seq.* and its implementing regulations including 40 C.F.R. Part 141, and had failed to comply with Complainant's administrative Compliance Order of July 11, 1997.[1] In his Complaint, Complainant requested the assessment of a civil penalty of

[1] The administrative Compliance Order of July 11, 1997 cited Respondent, a supplier of water to a public water system, for failing to sample and analyze the drinking water he supplied

$5,000 against the Respondent. Respondent failed to file a timely answer to the Complaint, and on February 24, 2000 Complainant filed his Motion for Default Against Respondent Glen Welsh, Owner, New Creek Investments. This ORDER **grants the Complainant's Motion** for Default Against Respondent Glen Welsh, Owner, New Creek Investments under the Default provisions of the Consolidated Rules, 40 C.F.R. § 22.17, and **assesses the Respondent a civil penalty of $5,000.**

DEFAULT PROVISIONS:

The Default provisions of the Consolidated Rules state that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint. Those provisions also provide that default by a respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

Where the motion for default requests the assessment of a penalty against the defaulting party, the movant must specify the penalty and state the legal and factual grounds for the penalty

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for a variety of contaminants over a period of several years, for failing to report results of the required analyses and for failure to notify the consuming public of detected violations of the Drinking Water Regulations. The Administrative Compliance Order directed Respondent to commence the required sampling and analysis immediately, to submit proper reports of the results and to provide appropriate public notification of violations of the National Primary Drinking Water Regulations.

The Administrative Compliance Order was issued after Respondent failed to respond adequately to a May 14, 1997 Notice of Noncompliance that cited Respondent for violations of the SDWA. The Notice of Noncompliance is a statutory prerequisite for the issuance of the administrative Compliance Order, which is itself a statutory prerequisite for the initiation of this administrative penalty assessment proceeding. *See* Sections 1414(a) and (g) of the Safe Drinking Water Act, 42 U.S.C. §§ 300-g-3(a) and (g).

requested. 40 C.F.R. § 22.17(b).

The Default provisions go on to require that when the Presiding Officer finds that a default has occurred, he shall issue a Default Order against the defaulting party unless the record shows good cause why a default order should not be issued. The relief proposed in the Complaint shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. If the Order resolves all outstanding issues and claims in the proceeding, it shall constitute the Initial Decision under the Consolidated Rules. 40 C.F.R. § 22.17(c).

FINDINGS OF FACT:

1. Respondent owns and operates, and at all relevant times relevant owned and operated, the New Creek Investments System.
2. The New Creek Investments System provides, and at all relevant times provided, water for human consumption through pipes.
3. The New Creek Investments System has, and at all relevant times had, at least fifteen (15) service connections.
4. The New Creek Investments System serves, and at all relevant times served, at least 25 year-round residents, but less than 1,000 persons.
5. The New Creek Investments System is, and at all relevant times was, used by the residents of an apartment building.
6. The New Creek Investment System is, and at all relevant times was, located five miles south of Keyser, Mineral County, West Virginia along US Route 50.
7. The New Creek Investments System is, and at all relevant times was, supplied by ground

water.

8. On May 14, 1997, Complainant issued Findings and Notice of Violation, Docket No. 03-97-033-VS ("NOV") pursuant to Section 1414(a)(1)(A) of the SDWA, 42 U.S.C. § 300g-3(a)(1)(A). The NOV notified the Respondent and the State of West Virginia that Respondent had, *inter alia*, exceeded the maximum contaminant level for coliform bacteria, that it had violated the National Primary Drinking Water Regulation ("NPDWR") for lead and copper monitoring, for nitrate monitoring, for gross alpha particle activity monitoring, for total coliform bacteria monitoring, and that Respondent had violated the public notification requirements for these violations.

9. On July 11, 1997, Complainant issued an Administrative Compliance Order, Docket No. III-97-040-DS, pursuant to Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g) ordering Respondent, *inter alia*, to comply with the Safe Drinking Water Act and certain of its implementing regulations at 40 C.F.R. Part 141 by properly monitoring for lead, copper, nitrates, bacteria and gross alpha particle activity, by performing a materials evaluation and site selection and by notifying the public of its failures to comply with the NPDWRs as required by 40 C.F.R. § 141.32. A copy of the Administrative Compliance Order is attached to the Administrative Complaint and is incorporated therein by reference.

11 The State of West Virginia has primary enforcement authority for public water systems in that State. The State has taken at least 17 enforcement actions against Respondent, including 15 Notices of Violation and two Administrative Orders.

10. Prior to issuing the Administrative Compliance Order, Complainant offered the State of West Virginia an opportunity to confer regarding the Order.

11. Respondent did not perform the actions required by the Administrative Compliance Order.

12. On July 15, 1999 Complainant filed an Administrative Complaint and Notice of Opportunity to Request Hearing ("Administrative Complaint") against Respondent, Glen Welsh, Owner, New Creek Investments, alleging that Respondent had violated the Safe Drinking Water Act ("SDWA"), 42 U.S.C. sections 300f *et seq.*, its implementing regulations including 40 C.F.R. Part 141, and the Administrative Compliance Order by failing to monitor for lead and copper, coliform bacteria, nitrate, alpha particle activity, by failing to perform a materials evaluation and site selection and by failing to provide the consuming public the required notification of its failures to comply with the monitoring requirements.

12. Complainant submitted a copy of the Administrative Compliance Order and the Administrative Complaint to the State of West Virginia upon their issuance.

13. In both the Administrative Complaint and the cover letter to the Administrative Complaint Complainant informed Respondent that an answer must be filed within thirty (30) days of receipt of the Complaint and that failure to file an answer may result in entry of a Default Order imposing the proposed penalties without further proceedings.

14. The Administrative Complaint also referred Respondent to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of

Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, [published at 64 *Fed. Reg.* 40138 (July 23, 1999)] a copy of which was provided to Respondent along with the Administrative Complaint.

15. Complainant served a copy of the Administrative Complaint upon Respondent on September 30, 1999 by certified mail, return receipt requested.

16. Service of the Administrative Complaint was completed as evidenced by the executed certified mail return receipt card.

17. The return receipt for the Respondent was signed October 5, 1999.

18. Complainant filed the executed service receipts with the Regional Hearing Clerk on January 18, 2000.

19. As of this date Respondent has not filed an answer.

20. Respondent's counsel was informed by letter from Complainant's counsel in advance of Complainant's intent to file a motion for default.

21. As of this date Respondent has not filed any response to Complainant's motion for default.

CONCLUSIONS OF LAW:

1. Respondent is a "person" as defined by Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 141.2.

2. The New Creek Investments System is, and at all relevant times was, a community water system (a type of public water system) within the meaning of Section 1401(15) of the Act, 42 U.S.C. § 300f(15), and 40 C.F.R. § 141.2.

3. The New Creek Investments System is, and at all relevant times was, a small water system within the meaning of 40 C.F.R. §§ 141.2 and 141.86.

4. Because Respondent operates a public water system he is, and at all relevant times was, a supplier of water within the meaning of Section 1401(5) of the Act, 42 U.S.C. § 300f(5), and 40 C.F.R. § 141.2.

5. The SDWA and its implementing regulations establish the requirements applicable to small public water systems including the National Primary Drinking Water Regulations ("NPDWRs") for control of lead and copper, for the monitoring of coliforms, for the monitoring of nitrate and for the monitoring of radioactivity found at 40 C.F.R. §§ 141.21-.30 and .80-.91.

6. Respondent failed to comply with the NPDWRs and with the Administrative Compliance Order issued in July of 1997.

7. Respondent's violations of the Safe Drinking Water Act render him liable for a penalty of not more than $27,500 per day of violation in accordance with 42 U.S.C. § 300g-3(g) and the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection Improvement Act of 1996 and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

8. The amount of the proposed penalty in this case, *i.e.* $5,000, was determined after taking into account the seriousness of the violations, the population at risk and other appropriate factors as appropriate.

9. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within 30 days

after service of the complaint.

10. 40 C.F.R. § 22.6(c) provides that service of a complaint is complete when the return receipt is signed.

11. 40 C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.

12. The Complaint was properly served upon the Respondent.

13. Respondent's failure to timely file an answer to the Complaint places it in default. 40 C.F.R. § 22.17.

14. This default constitutes an admission, by Respondent, of all facts alleged in the Complaint and a waiver, by Respondent, of its right to contest those factual allegations. 40 C.F.R. § 22.17(a).

15. This Default Order is being issued in accordance with 40 C.F.R. § 22.17(c) which provides that when a Presiding Officer determines that a default has occurred, he shall issue a Default Order against the defaulting party unless the record shows good cause why such an order should not be issued. The record of this proceeding does not show good cause why this Default Order should not be issued.

16. In accordance with 40 C.F.R. § 22.17(c), which requires that the Presiding Officer order the relief proposed in the motion unless it is clearly inconsistent with the record of the proceeding or the Safe Drinking Water Act, I took into account the seriousness of the

violations, the population at risk, and other appropriate factors.[2]

Respondent's violations are serious. Respondent has failed to comply with the requirements of the NPDWR and the Administrative Compliance Order which required him, *inter alia*, to monitor for bacteria, nitrates, gross alpha particle activity, copper and lead in accordance with the requirements of 40 C.F.R. Part 141. The United States Environmental Protection Agency ("EPA") has determined that exposure to those substances can present a health risk. Respondent has failed to monitor for lead which can interfere with blood chemistry and delay with physical and mental development in children. Respondent has failed to monitor for copper which has been shown to cause liver and kidney damage. Respondent has failed to monitor for coliform bacteria which is an indicator that the water may be contaminated with organisms that cause disease, including gastrointestinal disorders, and has failed to monitor for nitrates which are converted to nitrates in the bodies of young children. (Nitrates can interfere with the oxygen carrying capacity of children's blood.) Respondent has also failed to monitor for the presence of radionuclides. These failures to monitor are longstanding. Not only has Respondent failed to fully comply with the monitoring requirements in the approximately two and a half years since the July 1997 Administrative Compliance Order was issued, Respondent had failed to fully and properly monitor for these parameters long before that. For example, Respondent failed to monitor for bacteria for approximately 26 months in

[2] These are the factors a court assessing penalties must consider under Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), which I utilized in the absence of factors for administrative penalty assessment pursuant to Section 1414(g)(3) of the SDWA, 42 U.S.C. § 300g-3(g)(3).

the time period August 1991 through November 1996 and failed completely to monitor for nitrate at any time during 1993, 1994 and 1995. These violations placed at risk the residents of an apartment building who rely on Respondent's water system for their drinking water. Also important to the health of those residents is the fact that, in contravention of the Safe Drinking Water Act and its implementing regulations, Respondent never provided the public with notification of its failures to conduct this monitoring. In light of the Congressional Finding that "...consumers served by public water systems should be provided with information on the source of the water they are drinking and its quality and safety, as well as prompt notification of any violation of drinking water regulations,"[3] Respondent's violations represent a dismal and likely dangerous set of failure to comply with the law.

The record also clearly shows extreme recalcitrance on the part of the Respondent. Neither the extensive enforcement efforts of the State of West Virginia nor the EPA's previous efforts have had the necessary corrective effect upon the Respondent. Respondent's recalcitrance has led to the escalation of enforcement responses by the regulatory authorities.

There is no indication in the record of any economic savings or benefit resulting from these violations. However, since the collection of samples and their analysis would have cost the Respondent something over the years, I find it to be obvious that Respondent has benefitted financially by avoiding these costs, as well as by avoiding the costs of public

[3] Pub. L. 104-182 Section 3 (10). (Aug. 6, 1996)

notifications. In the absence of any evidence of the extent of such savings, a "token or symbolic amount may be assessed." 56 *Fed. Reg.* 29996, 30006 (July 1, 1991).

Finally, with respect to Respondent' ability to pay, there is no information indicating Respondent would be unable to pay the proposed penalty. The burden to raise and prove an inability to pay a penalty rests with the Respondent. With this record being devoid of any evidence to the contrary, the Respondent is deemed able to pay the maximum statutory penalty. 56 *Fed. Reg.* 29996, 30006 (July 1, 1991).

Accordingly, I hold that an assessment of a civil penalty of $ 5,000 is not inconsistent with the record of this proceeding or the Act.

These Findings of Fact and Conclusions of Law were drawn from Complainant's Default Motion, which meets the requirements of 40 C.F.R. § 22.17(b) that the movant must specify the penalty and state the legal and factual grounds for the penalty requested.

ORDER

It is HEREBY ORDERED that Respondent, Glen Welsh, Owner of New Creek Investments, is in default and is therefore liable for the violations alleged in the Complaint. It is further ORDERED that Respondent is liable for a penalty of $5,000 for the violations alleged in the Complaint. Respondent shall pay such penalty within 30 days after this Default Order becomes final in accordance with 40 C.F.R. § 22.27(c). Payment shall be made by forwarding a cashier's or certified check, payable to: "Treasurer, United States of America" and mailed to:

U.S. Environmental Protection Agency, Region III
P.O. Box 360515

Pittsburgh, Pennsylvania 15251-6515

Respondent shall send simultaneously a copy of the check to:

Regional Hearing Clerk (3RCOO)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103

This **Default Order constitutes an Initial Decision**, as provided in 40 C.F.R. § 22.17(b). This **Default Order shall become final** within forty-five (45) days after its service upon the parties and without further proceedings, unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings, or (2) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision. The procedures for appealing an Initial Decision are listed in the Consolidated Rules at 40 C.F.R.§ 22.30. A copy of the Consolidated Rules is attached.

INTEREST AND LATE PENALTY CHARGES

Additional charges will accrue if the civil penalty set forth below is not paid within sixty days of Respondent's receipt of this Default Order. The Federal Claims Collection Act, 31 U.S.C. § 3717, authorizes these charges. Interest will begin to accrue on this civil penalty if it is not paid within sixty days of Respondent's receipt of this order, as provided in 4 C.F.R. § 102.13(b). Interest will be assessed at the rate of the United States Treasury tax and loan rate, as provided in 4 C.F.R. § 102.13(c). A penalty charge of six percent per year will be assessed on any portion of the debt that remains delinquent more than ninety days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day

payment is due. 4 C.F.R. §102.13(e). Thus, to avoid the assessment of interest, Respondent must pay the civil penalty within sixty days of the receipt of this Order. To avoid the assessment of penalty charges on the debt, Respondent must pay the civil penalties within 150 days of receipt of this Order.

Date: April 28, 2000 /S/
Benjamin Kalkstein,
Regional Judicial Officer